

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 14-13158

RICHARD LOBERGER and RAYMOND MILLER,

Plaintiffs/Appellants,

v.

DEL-JEN, INC. and J&J MAINTENANCE, INC.,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
HONORABLE RICHARD SMOAK
(5:13-cv-299-RS/CJK)

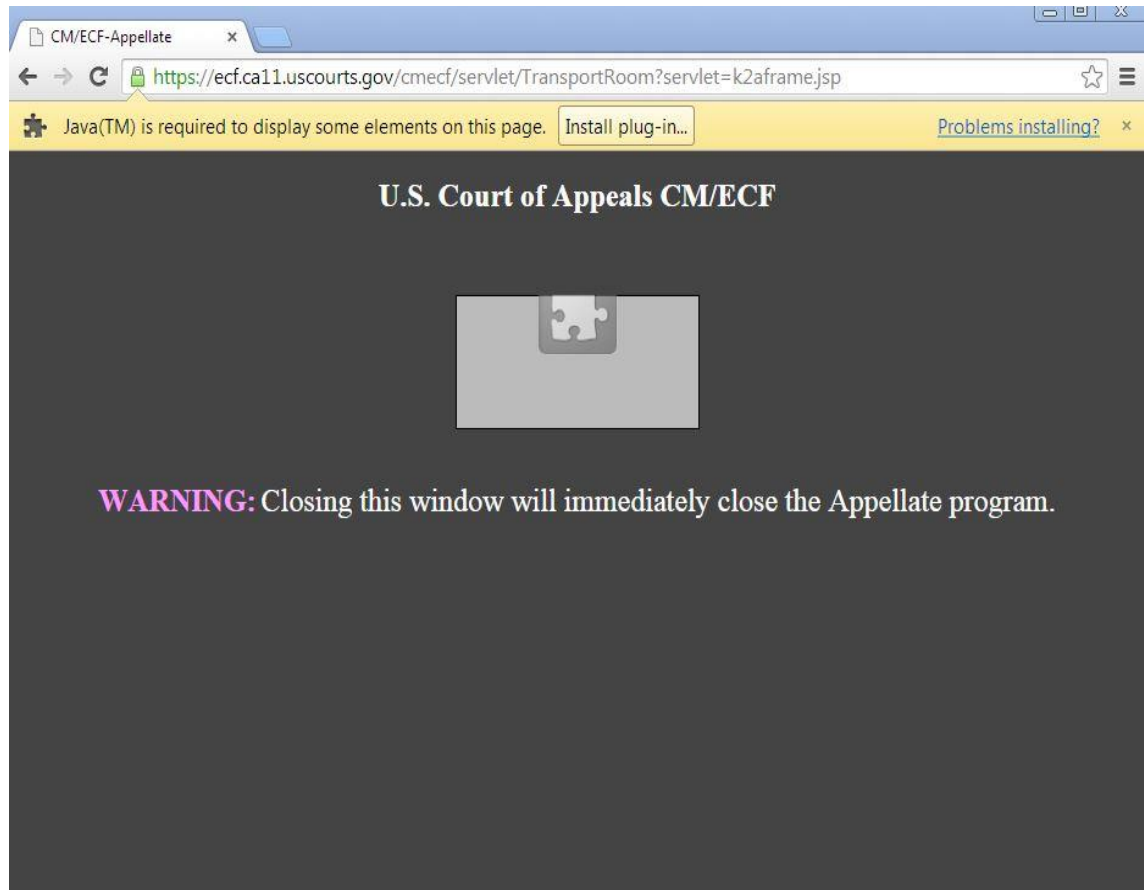
**APPELLANT'S MOTION TO SET ASIDE DISMISSAL AND REMEDY
DEFAULT**

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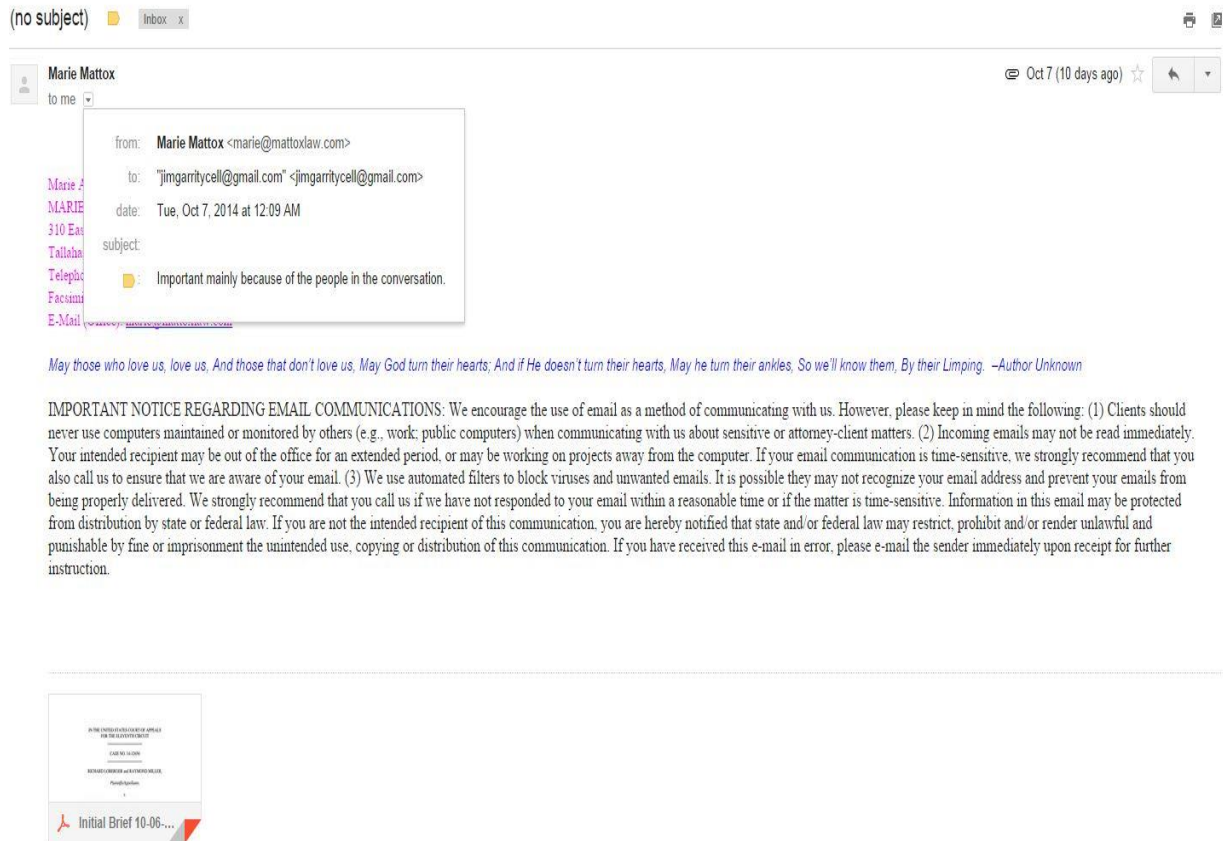
**APPELLANTS' MOTION TO SET ASIDE DISMISSAL AND REMEDY
DEFAULT**

Appellants, through their undersigned counsel, and pursuant to 11th Cir.R. 42-2(e), respectfully request that this Court set aside the dismissal of the main appeal, reinstate the main appeal and permit Appellant to remedy their default by accepting the untimely filings herewith, and states:

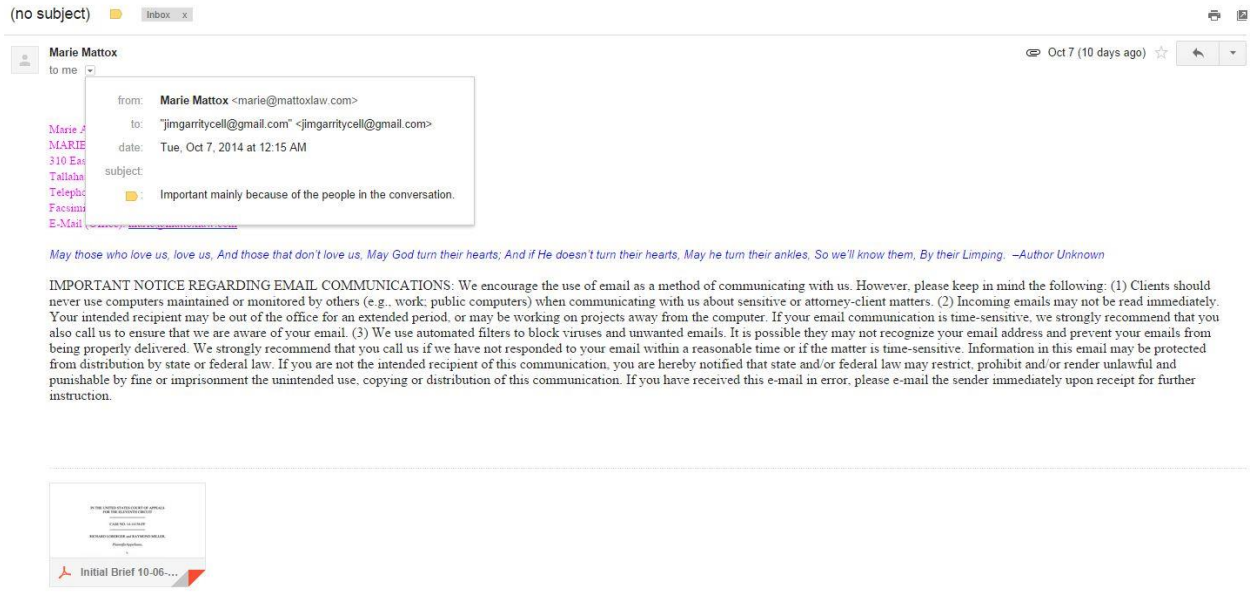
1. Appellants were granted an enlargement of time in which to serve and file their Initial Brief to and including October 6, 2014.
2. The Initial Brief was finalized and ready for filing on October 6, within the time provided by order. The undersigned was responsible for filing the brief, and began the process late the evening of October 6, 2014 and within a time frame that would have resulted in a timely filing. The undersigned routinely files federal filings at the end of each evening without incident. The undersigned logged into his law firm's servers using the remote-access service gotomypc.com, reviewed the Word file containing the Initial Brief to ensure the correct final version would be uploaded, and then logged into the Eleventh Circuit's website. In doing so, the undersigned encountered a screen similar to that appearing on the next page, advising that a Java plug-in was needed or needed updating. The screenshot below – taken this evening, October 17 - is the same that the undersigned encountered the evening of October 6, 2014:



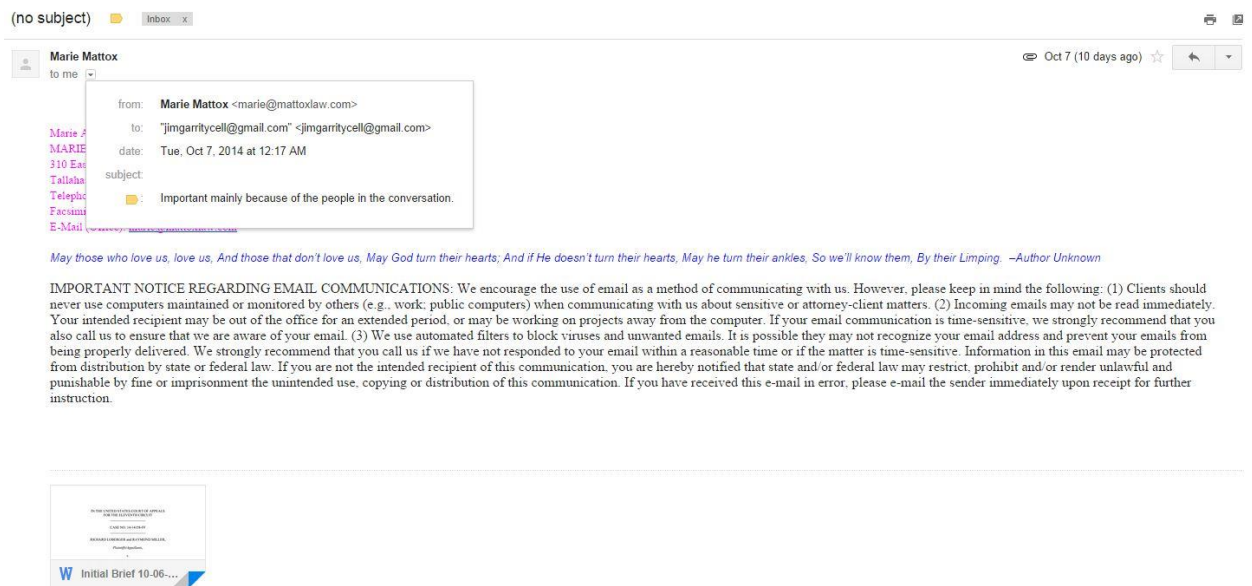
3. The undersigned attempted to install the plug-in but could not do so. The undersigned then had the Initial Brief forwarded to his personal email address evening of October 6, 2014. The Initial Brief was in final form on October 6, 2014, and it was that brief emailed to the undersigned by firm founder Marie Mattox, repeatedly, at 12:10 AM ET, 12:15 AM ET and 12:17 AM ET, because the Java plug-in issue was not resolving and every extraordinary effort was being undertaken to get the Initial Brief filed without access to the firm's information-technology expert:



Transmission of Initial Brief from firm servers to the undersigned's home email and computer, 12:10 AM ET October 7, 2014

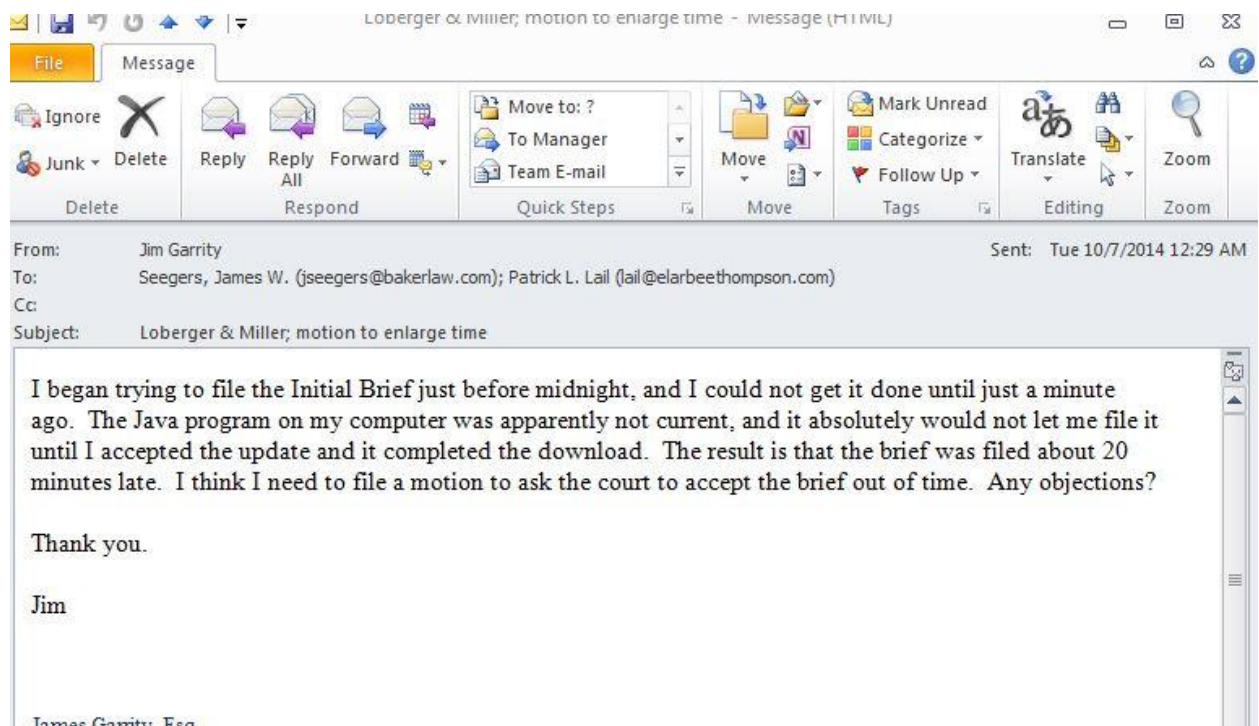


Second transmission of Initial Brief from firm servers to the undersigned's home email and computer, 12:15 AM ET October 7, 2014



Third transmission of Initial Brief from firm servers to the undersigned's home email and computer, 12:15 AM ET October 7, 2014

4. The undersigned encountered the same Java plug-in issue on his home computer, but was able to work around it because the security protocols on the firm's servers – which repeatedly blocked the download of the Java applet onto the undersigned's firm computer – do not affect the undersigned's home computer and the undersigned was able to install the applet and upload the brief.
5. By then, the brief was untimely by about thirty minutes. The undersigned then emailed counsels for both Appellees, as shown below, and was later advised that both consented to the untimely filing:
- 6.



7. The undersigned and his staff worked hard to complete the Initial Brief, to assemble a quality brief worthy of this Court's standards, and to ensure its timely filing. That effort fell short because of an unanticipated technology issue that the undersigned had not previously encountered. The undersigned uploads dozens of CM/ECF filings a motion, at the district court level, and has never previously encountered a similar issue. The undersigned is a rare filer on this Court's website, and was unaware the issue at hand was even a possibility. The undersigned takes seriously strict compliance with court rules, and fully expected the brief to be timely filed.
8. Respectfully, this Court should accept the Initial Brief, which was filed within approximately thirty minutes of the deadline, and which was the subject of a fully-consented motion to enlarge the time for filing by forty-minutes, to ensure the minimum enlargement needed and to allow for any variance in the clock times of the Court's servers compared to the undersigned's personal home desktop.
9. Following the dismissal of this action, and having consented to the requested forty-minute enlargement, both counsels for Appellees now object to this relief and to reinstatement of the appeal.

10. To ensure strict compliance with this Court's rules, and particularly, and, as required by 11th Cir.R. 30-1 & 42-2(e), has simultaneously herewith refiled the Initial Brief and Appendix.

11. If the Court deems appropriate, the undersigned will appear before it to respond to any query the Court deems appropriate, and to further accept any sanction the Court imposes. The Appellants respectfully deserve reinstatement and in no way contributed to the unexpected but complete bar to the undersigned's filing, triggered by the Java applet download notice and, in unfortunate tandem, the firm's IT system protocols blocking the downloading of software onto firm servers.

WHEREFORE, Appellants respectfully request that this Court grant their Motion to Set Aside Dismissal and Remedy Default, accept the Appendix for filing and reinstate the main appeal.

Respectfully submitted,

/s/ James Garrity
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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to all counsel of record this 17th day of October 2014:

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

The persons and entities known to Appellants to be interested in the outcome of this case are:

1. BAKER & HOSTETLER LLP
2. DEL-JEN, Inc. (Appellee)
3. ELARBEE, THOMPSON, SAPP, ETC LLP
4. Garrity, James (Counsel for Appellants)
5. J & J Maintenance, Inc. (Counsel for Appellee)
6. Lail, Patrick L. (Counsel for Appellee)
7. Libby, Sean M. (Counsel for Appellee)
8. Loberger, Richard (Appellant)
9. Marie A. Mattox, P. A. (Counsel for Appellants)
10. Mattox, Marie (Counsel for Appellants)
11. Miller, Raymond (Appellant)
12. Seegers, James W. (Counsel for Appellee)
13. Smoak, Richard (federal Judge)
14. Wilson, Stanford G. (Counsel for Appellee)

Respectfully submitted,

s/ James Garrity
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